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No. 89-1705

Supreme Court, U.S.
FILED
JUL 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ATLAS CORPORATION, KERR-McGEE CHEMICAL CORPORATION, PATHFINDER MINES CORPORATION, QUIVIRA MINING COMPANY, UMETCO MINERALS CORPORATION AND UNION CARBIDE CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

The Government's opposition brief misapprehends the nature and significance of the opinion of the court of appeals. That opinion expressly affirmed the Claims Court's reasoning that it lacked Tucker Act jurisdiction to hear a contract reformation claim where the mistake concerned "unknowable" facts. The court of appeals also attempted to demonstrate that dismissal

of petitioners' claims was consistent with the common law of contract reformation, but as shown in the petition for certiorari, that demonstration failed. The distinction between "unknown" and "unknowable" facts has no basis in either the common law or the Tucker Act, and its adoption serves to deny any forum to government contractors pursuing contract reformation claims based upon mutual mistakes as to latent hazards.

I.

Petitioners have alleged sufficient facts to satisfy the requirements for Claims Court jurisdiction under the Tucker Act and also to state a claim for reformation of contract based on a mutual mistake of fact.

Specifically, petitioners have alleged that they had agreements with the Government under which the Government agreed to compensate them for all significant costs associated with the production of uranium or thorium. Pet. App. 2a. It was known at the time of contracting that such operations would create tons of mill tailings and that such tailings would emit low-level radioactivity. Pet. App. 3a. The parties were mistaken, however, in their shared belief that these tailings did not pose a significant health hazard and would not require significant expenditures for disposal. Pet. App. 12a. As a result, their written agreements did not include any provision for these substantial costs. Now that the parties have discovered their shared error, petitioners seek to enforce their original bargain requiring compensation by the Government.

II.

The Government obscures the court of appeals' holding by introducing arguments that were not the basis for its opinion. Indeed, these arguments were made before both courts below and were adopted by neither of them. These arguments lack merit.

A. The Government characterizes the mistake at issue in this case as the parties' "fail[ure] to anticipate a future action by the government imposing a duty to clean up a hazard not yet recognized." Br. in Opp. 11. On this basis, the Government argues that petitioners' claims are not meritorious because the mistake at issue did not concern a fact in existence at the time of contracting but was instead an erroneous "prediction" of future events. Br. in Opp. 9-10.

This argument fails because petitioners have based their claims on the parties' failure to recognize facts in existence at the time of contracting: the facts that mill tailings posed a potentially serious health hazard and that abatement of this hazard would be expensive. These facts were no less true in the 1950's than they are today. Moreover, the passage of the UMTRCA in 1978 did not bring these facts into being. These facts have always been "in existence," and it is irrelevant whether one attributes current clean-up efforts to the UMTRCA, state regulations, the general safety requirements of the Atomic Energy Act of 1946, or good business practices. The fact that a mistake is subsequently revealed does not transform it into a mere error of "prediction." The hazard and the cost of abating the hazard were "hard" facts as to which the parties were mistaken at the time they entered

contracts intended to compensate petitioners for all costs related to their performances.

B. The Government also suggests that petitioners are claiming that passage of the UMTRCA rewrote the parties' original agreements. Br. in Opp. 12. This is simply incorrect. The petitioners are suing on their original agreements, which required compensation for all significant costs related to petitioners' operations. The Government's reliance on *Horowitz* v. *United States*, 267 U.S. 458, 461 (1925), is thus completely misplaced. *Horowitz* would bar petitioners' claims only if they sued the federal government for passing the UMTRCA in its role as sovereign. Petitioners here, however, seek reimbursement based on their contracts, and *Horowitz* thus *protects* their right to pursue these claims. Under the reasoning of *Horowitz*, the fact that the United States, as sovereign, has passed a law requiring stabilization of mill tailings sites in no way affects whether petitioners may pursue contract actions seeking reimbursement from the Government in its role as a contractor.

III.

The court of appeals affirmed the dismissal of petitioners' claims because they sought reformation of contracts based upon allegedly "unknowable" facts and because, supposedly, no "actual" agreement could exist concerning such facts. *See* Pet. App. 18a-20a. This *same* reasoning was the basis both for the court's jurisdictional holding *and* its holding that petitioners failed to state a claim. *Compare id.* at 18a-20a *with id.* at 10a-13a. The validity of this reasoning is thus squarely presented for review. As explained below, this reasoning is unsound.

A. Neither the courts below nor the Government challenges the notion that contracts may be reformed by the Claims Court based upon a fact "unknown" to the parties. Indeed, the very existence of a mutual mistake presupposes that the parties are ignorant as to some fact relevant to their agreement. In the instant case, however, the court of appeals upheld the Claims Court's ruling that the parties' mistake concerned a fact that was both "unknown" *and* "unknowable"— and it adopted the Claims Court's reasoning that if the parties *could not* know of their error, there could be no agreement that could form the basis for Tucker Act jurisdiction or for reformation of contract. Pet. App. 13a, 18a-19a. This reasoning is both illogical and unprecedented.

B. As a matter of logic, "knowability" has no bearing on whether parties can reach an agreement concerning an unknown fact. If parties do not know something, the fact that they could not know it places them at no greater disadvantage in reaching an agreement that encompasses the fact. In *Bowen-McLaughlin-York Co.* v. *United States*, 813 F.2d 1221 (Fed. Cir. 1987), for example, the Government originally agreed to pay all costs associated with production under a contract. When it was discovered that the parties had failed to consider a particular cost in entering their written, fixed-price contract, reformation of contract was granted to require payment of that expense. In determining whether an underlying agreement to pay all costs—such as the one in *Bowen*—is an "actual" agreement, it makes no difference whether the costs omitted from the written contract are merely "unknown" or are also "unknowable" to the parties.

C. The Government attempts to rehabilitate the court of appeals' opinion by focusing on its discussion of *National Presto Industries, Inc.* v. *United States*, 338 F.2d 99 (Ct. Cl. 1964), *cert. denied*, 380 U.S. 962 (1965).[1] In *National Presto*, the parties did not know of the need for an extra step in a new process of manufacturing artillery shells and did not know it would take a long time to discover that need and to perfect the process. *Id.* at 108-09. Nevertheless, the Court of Claims reformed the parties' contract to require Government contribution toward paying for this unknown step. The Government argues that *National Presto* is distinguishable because the parties in that case were aware there *might* be an additional manufacturing step—whereas here, the Government asserts, the parties had no intimation whatsoever that tailings were unsafe. Br. in Opp. at 10-11. The Government thus implicitly suggests that the test of whether a fact is "knowable" is whether the parties discussed and had some awareness of their possible error. In making this argument, however, the Government ignores the facts of the instant case and proposes a principle that squarely conflicts with the law of contract reformation.

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[1] The Government (Br. in Opp. at 10 n.4) and the court of appeals (Pet. App. 10a-11a) also discuss, and fail to distinguish, *Aluminum Co. of America* v. *Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980). In *ALCOA*, the parties knew that the Wholesale Price Index existed and they could (and did) have a belief as to its accuracy as an indicator of non-labor costs. *Id.* at 63-64. Similarly, the parties in the instant case knew tailings would exist and they could (and did) have a belief as to the hazards of tailings and disposal requirements. In both *ALCOA* and the instant case, notwithstanding that the parties could (and did) form a belief on a certain subject, the truth of the matter at issue was "unknowable."

D. The court of appeals recognized that the process of milling uranium and thorium produces large piles of mill tailings and that petitioners contend the parties *knew* at the time of contracting that the tailings would emit low-level radioactivity. Pet. App. 3a. Petitioners' complaints, as excerpted by the court of appeals, do not allege utter ignorance of radioactivity, but rather allege that the parties did not and could not know the potential seriousness of the hazard posed by mill tailings or the expense of abating that potential hazard. Pet. App. 12a. In both this case and in *National Presto*, the parties had sufficient knowledge to form a mistaken belief, but did not know and could not know everything about the fledgling industries in which they were engaged. 338 F.2d at 109. The fact that petitioners and the Government in this case could not know the extent of the hazard or of the expense they faced in no way conflicts with the allegation that their written agreements were based upon a mistaken assumption that the hazard was minimal and that no substantial expenditures would be needed for tailings disposal.

E. The Government, in attempting to extract a rule from *National Presto* that would exclude petitioners' claims, has suggested a standard that flatly contradicts the common law of contract reformation. To satisfy the Government, it appears, petitioners should not only have alleged that the facts at issue were "knowable," but that the parties were specifically aware of and discussed the possibility that their understanding was mistaken. *See* Br. in Opp. 11. This rule however, is not supported by *National Presto*[2]

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[2] In *National Presto*, "[t]he crucial error was as to the work

and was not adopted by the court of appeals. If the parties had been specifically cognizant of their possible error, then their deliberate failure to investigate or to include some relevant provision in their contract would constitute either "willful ignorance" or an "assumption of risk" by one of the parties. Under traditional common law principles, either situation would *bar* an action for reformation of contract.[3] Petitioners have not alleged such a situation here, and to require that petitioners make such allegations—which would necessarily defeat their claims—would be nonsensical.

IV.

The Government has failed to cite any case in which contract reformation or Tucker Act jurisdiction was denied because a fact as to which parties were mistaken was "unknowable." The simple reason for this failure is that the holding below is a novel—and er-

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necessary to show the need for turning equipment. On that point there was no consideration and no discussion." 338 F.2d at 109.

[3] *See, e.g.*, *Backus* v. *MacLaury*, 278 A.D. 504, 106 N.Y.S.2d 401 (1951) (where, at time of sale of a bull calf less than a month old, "[b]oth parties knew that the minimum age at which the fertility of the animal could be 'safely determined' was 'approximately twelve months,' " the buyers "assumed the chance of sterility 'as one of the elements of the bargain' "); 13 S. Williston, *A Treatise on the Law of Contracts* § 1543, at 75 (3d ed. 1970) ("[T]here must be excluded from consideration mistakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk."); 3 A. Corbin, *Corbin on Contracts* § 598, at 585-86 (2d ed. 1960) ("The same result obtains in any case where the risk of the existence of some factor or of the occurrence of an event is consciously considered in agreeing upon terms. There is no mistake; instead, there is awareness of the uncertainty, a conscious ignorance of the future.").

roneous—application of the distinction between "actual" and "implied-in-law" agreements that not only conflicts with common law principles of contract reformation but also improperly curtails the jurisdiction of the Claims Court.

The Government nowhere denies that petitioners' claims are of great value and that the decision below will deprive future Government contractors of the only forum in which they might pursue a claim for reformation of contract based on mutual mistake concerning unrecognized chemical or environmental hazards. The fact that such mutual mistakes could not have been discovered by the parties does not distinguish them from the more mundane errors found in a host of other contract reformation cases. The distinction between "unknown" and "unknowable" facts serves no purpose but to deny Claims Court jurisdiction over a class of reformation cases and thereby insulate the Government from substantial liability in an increasingly important field of litigation.

CONCLUSION

For the foregoing reasons, and those previously stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 18, 1990